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March 6, 2006



BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington DC 20423

RECEIVED
Office of the Secretary
Surface Transportation Board
March 6, 2006

Re: STB Ex Parte No. 647, Class Exemption for Expedited Abandonment Procedure
for Class II and Class III Railroads

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Comments of Allegheny & Eastern Railroad, Inc., *et al.*, with respect to the Advanced Notice of Proposed Rulemaking served in this proceeding on January 19, 2006.

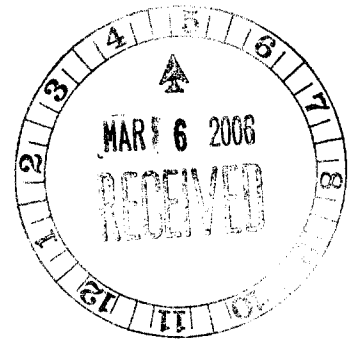
Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

Mark H. Sidman

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

**ALLEGHENY & EASTERN RAILROAD, INC., *ET AL.* –
CLASS EXEMPTION FOR EXPEDITED ABANDONMENT
PROCEDURE FOR CLASS II AND CLASS III RAILROADS**

COMMENTS OF PETITIONERS

FILED
Office of the Secretary

March 6, 2006

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Dated: March 6, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

**ALLEGHENY & EASTERN RAILROAD, INC., *ET AL.* –
CLASS EXEMPTION FOR EXPEDITED ABANDONMENT
PROCEDURE FOR CLASS II AND CLASS III RAILROADS**

COMMENTS OF PETITIONERS

On May 15, 2003, sixty-five Class II and Class III railroads¹ (“Petitioners”) filed a petition for rulemaking (the “Petition”) at the Surface Transportation Board (“Board”). The Petition urged the Board to institute a rulemaking proceeding to adopt a new notice of exemption

¹ Allegheny & Eastern Railroad, Inc.; AN Railway, LLC; Atlantic and Western Railway, LP; Bay Line Railroad, LLC; Bradford Industrial Rail, Inc.; Buffalo & Pittsburgh Railroad, Inc.; Carolina Coastal Railway, Inc.; Central Midland Railway; Chicago SouthShore & South Bend Railroad; Chattahoochee & Gulf Railroad Co., Inc.; Commonwealth Railway, Inc.; Conecuh Valley Railroad Co., Inc.; Copper Basin Railway, Inc.; Corpus Christi Terminal Railroad, Inc.; The Dansville & Mount Morris Railroad Company; East Tennessee Railway, LP; Eastern Idaho Railroad, Inc.; Galveston Railroad, LP; Genesee & Wyoming Railroad Company; Georgia Central Railway, LP; Golden Isles Terminal Railroad, Inc.; H&S Railroad Co., Inc.; Illinois Indiana Development Company, LLC; Illinois & Midland Railroad, Inc.; The Indiana Rail Road Company; Kansas & Oklahoma Railroad, Inc.; Knoxville & Holston River Railroad Co., Inc.; KWT Railway, Inc.; Lancaster and Chester Railway Company; Laurinburg & Southern Railroad Co., Inc.; Little Rock & Western Railway, LP; Louisiana & Delta Railroad, Inc.; Louisville & Indiana Railroad Company; M&B Railroad, LLC; Minnesota Prairie Line, Inc.; Montana Rail Link, Inc.; New York & Atlantic Railway Company; Pacific Harbor Line, Inc.; Palouse River & Coulee City Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Piedmont & Atlantic Railroad Inc.; Pittsburg & Shawmut Railroad Inc.; Portland & Western Railroad, Inc.; Rochester & Southern Railroad, Inc.; Rocky Mount & Western Railroad Co., Inc.; St. Lawrence & Atlantic Railroad Company; Salt Lake City Southern Railroad Company; Savannah Port Terminal Railroad, Inc.; South Buffalo Railway Company; South Kansas & Oklahoma Railroad Company; Stillwater Central Railroad; Talleyrand Terminal Railroad, Inc.; Three Notch Railroad Co., Inc.; Timber Rock Railroad, Inc.; Tomahawk Railway, LP; Twin Cities & Western Railroad Company; Utah Railway Company; Valdosta Railway, LP; Western Kentucky Railway, LLC; Wheeling & Lake Erie Railway Company; Willamette & Pacific Railroad, Inc.; Wilmington Terminal Railroad LP; Wiregrass Central Railroad Company, Inc.; Yolo Shortline Railroad Company; and York Railway Company. Since the filing, Allegheny & Eastern Railroad, Inc., Bradford Industrial Rail, Inc. and Pittsburg & Shawmut Railroad Inc. have been merged into Buffalo & Pittsburgh Railroad, Inc. See STB Finance Docket No. 34447, *Buffalo & Pittsburgh Railroad, Inc., Allegheny & Eastern Railroad, Inc. and Bradford Industrial Rail, Inc. – Corporate Family Transaction Exemption*, served January 22, 2004.

procedure that would expedite abandonments for small railroads.² As discussed in detail in the Petition, the existing regulatory scheme for abandonments forces small railroads to engage in the wasteful process of raising rates, deferring maintenance and reducing service on a line slated for abandonment. These steps – which make perfect business sense for a railroad that has concluded that a line cannot be operated profitably – eventually cause the traffic on the line to dry up. Then, after the line in question has handled no local traffic for two years, the small railroad can use the notice of exemption procedures for abandonment of out-of-service lines (49 C.F.R. § 1152.50) to obtain the necessary regulatory authority to abandon the line in question.³

The Petitioners believe that this process is wasteful and confers no benefits on railroads, shippers or communities. The existing regulatory procedures for abandonments do not “save” rail service on lines identified by small railroads as incapable of supporting rail service; at best, the existing regulations merely delay the inevitable result that flows from a carrier’s determination that a rail line cannot support rail service. By the time the subject line is abandoned under the existing regulatory scheme, the infrastructure and traffic base have deteriorated past the point of a new owner having any hope of reviving rail service.

Valuable capital resources – the liquidation value of the subject line – sit unproductively for years while the small railroad waits for the clock to run on the two years out-of-service threshold. Meanwhile, the small railroad struggles to maintain and upgrade the productive parts of its systems. Investments in track that can handle 286,000-lb. cars and in environmentally friendly locomotives (among other capital spending needs) are put on hold until abandonment

² The term “small railroads,” as used herein, refers to Class II and Class III carriers, as those terms are defined in 49 C.F.R. Part 1201, 1-1.

³ For reasons explained in detail in the Petition, small railroads typically do not file formal applications and often prefer not to petitions for exemption to obtain abandonment authority because of the cost and uncertainty of result under those regulatory procedures.

authority can be obtained. Shippers and communities would be far better served by an expedited abandonment process that allows efficient redeployment of capital.

The proposed rule that was included as part of the Petition (the "Proposed Rule"), if adopted, would permit Class II and Class III carriers to abandon lines promptly after the carrier determines it can no longer profitably operate the lines. This rule would thereby allow the abandonment to occur before traffic on those lines has dried up and before the infrastructure on those lines has deteriorated beyond repair. As noted in the Petition, small railroads are geographically confined and have limited opportunities to expand their traffic base. Thus, these carriers are unlikely to abandon any line that has even the faintest potential for profitable operation.

However, in the rare case when a small railroad misjudges the profitability potential of its line, the Proposed Rule provides for enhanced offer of financial assistance ("OFA") procedures that increase the likelihood that shippers, government entities or entrepreneurs will purchase the line for net liquidation value. And, under the Proposed Rule, the opportunity to purchase the line under the OFA procedures would occur before the infrastructure and traffic base has been destroyed. For all these reasons, Petitioners believe the Proposed Rule serves the public interest.

In the Advanced Notice of Proposed Rulemaking published by the Board on January 19, 2006 (the "ANPR"), the Board raises several questions and issues regarding the Proposed Rule. In this filing, Petitioners address those questions and issues.

1. The Proposed Rule Meets the Statutory Requirement for Adopting a Class Exemption.

In the ANPR, the Board notes that "Petitioners' proposed class exemption would require a finding that the balancing analysis under Section 10903 is unnecessary for some classes of carriers based only on their annual revenue." ANPR at 5. The Board goes on to say that, "it would be useful to know the average length of lines abandoned by . . . [small railroads] and the average number of shippers affected by such abandonments." *Id.*

The Proposed Rule, if adopted, would establish a notice of exemption process for Class II and Class III carriers only; the expedited procedures would not be available to Class I carriers. However, the use of annual revenues to distinguish between carriers is nothing new in the context of the Board's class exemption procedures. For example, under 49 C.F.R. §§ 1150.32 and 1150.35, carriers must comply with different requirements, based solely on the annual revenues of the carrier, in order to qualify for the class exemption for the acquisition and operation of lines. In the proceeding adopting the rules under Section 1150.35, the Interstate Commerce Commission ("Commission") (predecessor to the Board) discussed the use of a carrier's revenue to distinguish between classes of carriers. The Commission stated that "this dividing line is less arbitrary (every one is to some extent) than others such as mileage, carloadings, or ton/miles, in that it is a recognized dividing line for many other regulatory purposes." *See Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 4 ICC.2d 309, Feb. 11, 1988.

Two other class exemptions adopted by the Board or the Commission similarly use a carrier's revenue as a dividing line. In both the class exemption under 49 C.F.R. § 1180.2(d)(2) (certain acquisition of or continuance in control transactions) and the class exemption under 49 C.F.R. § 1150.41 *et seq.*, (acquisition of lines by existing carriers under 49 U.S.C. § 10902), a carrier's ability to use the class exemption is determined by the annual

revenues of one or more of the carriers involved in the subject transaction. Thus, the class exemption proposed by Petitioners', which uses a carrier's revenue to determine the exemption's availability, is consistent with limitations used in other class exemptions.

In the context of the Proposed Rule, the distinction between small railroads and Class I carriers is appropriate. According to the American Short Line and Regional Railroad Association (ASLRRA), the typical small railroad operates approximately 87 miles of rail line⁴ and has revenues of approximately \$5.5 million. The seven Class I's, on the other hand, have system sizes that average approximately 24,130 miles (2004), and generate from \$636 million to \$12.2 billion in annual freight revenues (2004). The behemoth Class I's obviously view abandonments very differently from small railroads.⁵ There is little likelihood that a small railroad, which by definition serves a limited geographic market and has limited commercial opportunities, would choose to abandon any portion of its system that can support rail service.

In 2005, the Board (or its Office of Proceedings) served decisions/notices in 32⁶ abandonment and/or discontinuance cases filed by Class II and Class III railroads⁷, and the

⁴ ASLRRA data indicate that the *median* Class III railroad operates approximately 32 miles of rail line.

⁵ The Proposed Rule, by its terms, applies only to Class II and Class III carriers. Petitioners express no view as to whether similar procedures would be appropriate for abandonment of rail lines by Class I carriers.

⁶ Based on the Board's website, Petitioners identified 32 small railroad abandonment and/or discontinuance decisions/notices served in 2005. A list of those 32 cases is set forth on Appendix A attached hereto.

⁷ In 2005, the Board also granted an application to adversely discontinue one rail carrier's operations over the line in favor of a substitute operator and converted a conditional grant of abandonment authority to a grant of discontinuance authority when the railroad failed to demonstrate it had sufficient property interest to abandon the line. See STB Docket No. AB-878, *City of Peoria and the Village Of Peoria Heights, IL – Adverse Discontinuance – Pioneer Industrial Railway Company*, served August 10, 2005 and STB Docket No. AB-862X, *Twin State Railroad Company – Abandonment Exemption – In Caledonia and Essex Counties, VT*, served November 18, 2005. Neither these two cases, nor any cases concerning the discontinuance of trackage rights, are included in our discussion of the relevant 32 decisions/notices in 2005.

Board denied or rejected the exemption (or issued a stay to reconsider the merits of the exemption) in only four⁸ of those cases.⁹ The average length of the subject line(s) in those cases was approximately 13.15 miles. Of these 32 cases, 12 involved two miles of track or less, and more than half involved five miles or less. To the extent Board decisions indicated the number of affected shippers (*i.e.*, shippers currently active on the line that would lose service as a result of the abandonment or discontinuance), there was an average of less than one per case. More telling, opposition by any shipper – whether an active shipper or not – amounted to an average of less than one shipper per case. And this was true regardless of whether petitions for exemption and notices of exemptions are considered separately or together. The data for the mileage of abandoned lines and the number of adversely affected shippers underscore the fact that small railroad abandonments rarely involve lines of significant mileage and rarely affect meaningful numbers of shippers.

2. The Fact that Congress Chose Not to Eliminate the Public Convenience and Necessity Standard From the Abandonment Statute Does Not Weigh Against Adopting the Proposed Rule.

In the ANPR, the Board notes that, in the context of the debate over the ICC Termination Act of 1995 (“ICCTA”), Congress considered, but ultimately rejected, eliminating the public

⁸ In two of the cases that were denied, the denials were entered without prejudice because the small railroad failed to include sufficient documentation to support its filing. The Board in both these cases indicated that the abandonment request could be refiled. See STB Docket No. AB-290 (Sub-No. 236X), *The Cincinnati, New Orleans and Texas Pacific Railway Company – Abandonment Exemption – In Roane County, TN*, served Dec. 2, 2005 and STB Docket No. AB-441 (Sub-No. 4X), *San Pedro Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, served September 15, 2005. In 2006, the San Pedro Operating Company, LLC refiled its request for abandonment authority, which the Board granted in STB Docket No. 1081X, served February 3, 2006. In the third case, the filing did not satisfy the notice of exemption requirements because the carrier had handled some cars on the subject line during the two-year period prior to filing. See STB Docket No. AB-1067X, *General Railway Corporation d/b/a/ Iowa Northwestern Railroad – Abandonment Exemption – In Osceola and Dickinson Counties, IA*, served Sept. 23, 2005. In the fourth case, the Board subsequently stayed the abandonment exemption when questions arose whether the operator had incorrectly stated that affected shippers would continue to receive rail service. See STB Docket No. AB-1066X, *Central Illinois Railroad Company – Discontinuance of Service Exemption – In Peoria County, IL*, served December 23, 2005, stayed by decision served January 20, 2006 in this proceeding. In none of these four cases did the Board conclude that the subject line was viable.

⁹ This small number of denials is consistent with the Board’s own finding regarding abandonments, in general. In its FY 2002-2204 Report, the Board determined an approval rate of *just under 98 percent* for applications, petitions and notices to abandon filed by all railroads in 2002, 2003 and 2004.

convenience and necessity ("PC&N") standard from the abandonment provision of the statute.¹⁰

The Board questions how it "could justify going beyond the action Congress took in ICCTA."

ANPR at 5.

The fact that Congress considered eliminating the public convenience and necessity ("PC&N") test from ICCTA, but ultimately decided not to do so, does not argue against adopting the Proposed Rule for several reasons. *First*, like the existing notice of exemption procedures for abandonments of out-of-service lines (49 C.F.R. § 1152.50), the Proposed Rule does not eliminate the PC&N test set forth in Section 10903. Rather, as part of its analysis under the exemption provision of Section 10502, Petitioners urge the Board to find that the public convenience and necessity permits or requires that, as a class, small railroads be allowed to abandon lines in an expedited manner because (i) the Board finds it highly unlikely that small railroads would abuse such procedures by abandoning profitable portions of their small systems, (ii) the Board determines that, once a small railroad decides that a line cannot be operated profitably, the line is highly likely to be abandoned ultimately because the small railroads will take the rational steps of raising rates, deferring maintenance and reducing service on that line, (iii) the Board finds that the public interest is not served by providing regulatory incentives to small railroads to allow infrastructure to deteriorate and traffic to be diverted in the period prior to abandonment, (iv) the Board finds that the public interest is served by allowing small railroads, which have limited access to capital markets, to efficiently redeploy capital from lines

¹⁰ The House Report indicated that the proposal to eliminate the public convenience and necessity test was intended to facilitate purchase of unprofitable lines of large carrier by small railroads, *see* H.R. Rep No. 104-422 (Dec. 18, 1995). But, in 1995, a class exemption already existed to facilitate such transfers, without going through intermediate step of abandonment. *See* 49 C.F.R. § 1150.31 *et seq.* Presumably, Congress realized this was the case and decided not to enact the proposal. The Proposed Rule, on the other hand, concerns unprofitable lines that are *already* being operated by small railroads. An unprofitable line operated by a large railroad may become a profitable operation in the hands of a smaller railroad, due to the smaller railroad's lower cost structure and focus on local marketing. However, an unprofitable line already operated by a small railroad is unlikely to present a similar potential for profitability to a different small railroad. Thus, the focus of the Proposed Rule is significantly different than the focus of the proposed House provision.

that do not support rail service to those that do, and (v) the Board finds that the combination of enhancing OFA procedures and permitting small railroads to abandon lines as soon as possible following a determination that a line is not viable, would serve the public interest by increasing the likelihood that abandonment candidates will be purchased for continued rail use.

Second, the Proposed Rule satisfies the two-pronged statutory test for a class exemption under 49 U.S.C. § 10502(a), *i.e.*, that (i) application of the statutory provision in question is not necessary to carry out the rail transportation policy set forth in 49 U.S.C. § 10101 (the “RTP”), and (ii) either (A) the transactions in question are of limited scope, or (B) application of the statutory provision in question is not necessary to protect shippers from an abuse of market power. With respect to the first prong of the Section 10502(a) test, a review of the RTP reveals that the application of Section 10903 to line abandonments by small railroads actually hinders most aspects of the RTP. As set forth, in large measure, in Petitioners’ September 15, 2004, filing in this proceeding,¹¹ below is a discussion of each subsection of the RTP as applied to the Proposed Rule.

Section 10101(1), which states a policy -- “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail” - - and Section 10101(6), which states a policy -- “to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital” – are not advanced by procedures under Section 10903 that result in small railroads being forced to operate rail lines for years after

¹¹ Petitioners’ September 15, 2004, filing was a reply to written questions submitted to Petitioners by Board Member W. Douglas Buttrey at the oral hearing held on August 31, 2004. Board Member Buttrey was unable to attend the hearing. The Chairman provided the questions to Petitioners’ counsel, on behalf of Board Member Buttrey, at the close of the hearing.

those lines have been determined to be unprofitable. A regulatory procedure that results in a small railroad being required to incur losses for years, until it is “safe” to file for abandonment by use of the class exemption for out-of-service lines, does not facilitate rates established by competition and demand for services. Similarly, once a small railroad has determined that it can no longer continue to provide service at a loss in hopes of building traffic, it will often be forced to raise rates to non-competitive levels. A long, drawn-out abandonment process does not advance the goal of maintaining reasonable rates.

Section 10101(2), which states a policy -- “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required” -- and Section 10101(7), which states a policy -- “to reduce regulatory barriers to entry into and exit from the industry” -- and Section 10101(15), which states a policy -- “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part” -- each is not advanced by procedures under § 10903 that turn the abandonment of a rail line into a multi-year process during which a small railroad incurs losses and cannot redeploy assets. This is especially the case since the denial rate for small railroad abandonment and discontinuance cases for the year 2005 was 12.5 percent.¹²

The policy set forth in Section 10101(3) -- “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board” -- and the policy set forth in Section 10101(8) -- “to operate transportation facilities and equipment without detriment to the public health and safety” -- are hindered, not promoted, by

¹² See footnote 5, *supra*, for a discussion of the four denials. As set forth in the Surface Transportation Board FY 2002-2004 Report, abandonments are routinely granted, regardless of whether the carrier files an application, petition for exemption or notice of exemption. For FY 2002, 2003 and 2004, the Board granted abandonments in 257 cases and denied abandonment in just six cases. As noted in footnote 9, this is an approval rate for abandonments filed by all carriers of almost 98 percent.

Section 10903. In the drawn out period between the date on which the small railroad determines the line cannot be operated profitably and the date on which the railroad begins the abandonment process at the Board (the "Pre-filing Period"), small carriers reduce maintenance and capital spending on the line to be abandoned. This results in deterioration of the rail infrastructure, which has safety implications. At the same time, by freezing the assets on an unproductive line during the Pre-filing Period, small carriers are unable to invest the value of the assets on the abandonment candidate in lines that support rail service, which hinders small railroads from improving the safety and efficiency of those lines.

The policy set forth in Section 10101(4) -- "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense" -- and the policy set forth in Section 10101(5) -- "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes" -- likewise are hindered by applying Section 10903 to small railroads. When small railroads are required to endure years of unnecessary losses and years in which they cannot redeploy assets, those carriers cannot compete effectively with other railroads or with trucks and barges.

The policy set forth in Section 10101(9) -- "to encourage honest and efficient management of railroads" -- is not advanced by the protracted abandonment process under Section 10903. The efficient management of railroads would allow small railroads to quickly exit markets that cannot sustain rail service and redeploy assets to markets that do support such service.

Neither the policy in Section 10101(10) -- "to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general

applicability” – nor the policy in Section 10101(14) -- “to encourage and promote energy conservation” -- is advanced by the abandonment procedures under Section 10903.

The policy is Section 10101(11) -- “to encourage fair wages and safe and suitable working conditions in the railroad industry” -- is not advanced by the drawn out process that small carriers go through when abandoning lines under Section 10903. The losses incurred by small railroads as a result of their inability to exit from markets that do not sustain rail service, reduce small railroad profits. This, in turn, reduces the ability of those carriers to provide better compensation and benefits to their employees. Similarly, losses that reduce profits make it more difficult for small railroads to improve working conditions by upgrading track and equipment.

The policy in Section 10101(12) -- “to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination” -- is not advanced by applying Section 10903 to small railroads. Small railroads that are abandoning lines do not have market power, as evidenced by the fact that they are unable to generate sufficient revenues from the traffic moving over the subject line.

The policy set forth in Section 10101(13) -- “to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information” -- is not advanced by Section 10903. The application procedure under that section requires extensive data in Uniform System of Accounts format, which Class II and Class III carriers are not otherwise required to produce.

The foregoing demonstrates that the application of Section 10903 to abandonments by small railroads is not necessary to promote the RTP. In addition, rail line abandonments by small railroads are limited in scope – averaging just 13.15 miles in 2005, with more than half involving five miles or less – thereby satisfying the second prong of the statutory test for the

adoption of a class exemption. Under such circumstances, there is little doubt that abandonments by small railroads are limited in scope.¹³

Section 10502(a) directs that "the Board, to the maximum extent consistent with this part, shall exempt . . . a class of persons . . ." from a requirement of ICCTA where it finds that application of that provision (i) is unnecessary to carry out the RTP, and (ii) either (A) the transaction is limited in scope, or (B) "application . . . of the provision is not needed to protect shippers from the abuse of market power." This test is fulfilled here. The existing procedures under Section 10903 hinder, rather than promote, the RTP; the transactions are of limited scope; and application of the existing procedure under Section 10903 is not necessary to protect shippers from market abuse. Moreover, the public convenience and necessity permits or requires small railroads to abandon lines on an expedited basis. Under these circumstances, Section 10502(a) directs that the Board adopt the type of class exemption urged by Petitioners.

3. Local Communities Typically Are Not Materially Adversely Affected By Abandonments by Small Railroads

The Board states in the ANPR that it seeks information regarding the typical effect on local communities as a result of small railroad abandonments. Although it is difficult to quantify the "effect" of an abandonment, the absence of sufficient demand for rail service to sustain ongoing service strongly suggests that the effect of abandonment is unlikely to be profound.

As a general matter, small railroads typically do not serve captive shippers (*i.e.*, shippers whose products can be handled only by rail). Where small railroads do serve such shippers, it is extremely unlikely that the line serving a captive facility will be abandoned because even small captive facilities usually will generate sustaining volumes of traffic at compensatory rates. Thus,

¹³ The statutory criteria for a class exemption requires that abandonment by small railroads *either* be limited in scope *or* not require regulation to protect shippers from market power abuse. In addition to being limited in scope, abandonments by small railroads also do not subject shippers to market abuse. Small railroads obviously do not have pricing power over shippers located on lines that are abandonment candidates, as evidenced by the fact that the small railroads cannot handle enough traffic to support on-going operation of the lines.

the doomsday scenario of a small railroad abandonment directly causing the shut-down of a rail-dependent customer would be aberrational. But, in such cases, if the volume of traffic on the subject line were sufficient to support rail traffic or if some party were willing to subsidize a losing operation, the shipper, community or other entrepreneurs can use the OFA procedures to buy the line and continue rail service.

Similarly, small railroad abandonments of lines serving non-captive shippers are unlikely to have material adverse effects on communities. If non-captive shippers cannot generate sufficient traffic to support rail traffic, this typically means either that (i) local shippers prefer truck or barge service, or (ii) there simply is not enough local business to support rail service along with other modes. In either case, the shippers will continue to have transportation options following the cessation of rail service. Although the presence of rail service may serve as a “stalking horse” to keep truck or barge rates reasonable, and rates on those other modes may increase in the wake of an abandonment, there is little reason to believe that the other modes would increase rates to catastrophic levels. Moreover, the Board has concluded that such considerations do not play a determining role in abandonment cases.¹⁴ In light of the huge capital investment needed to keep rail infrastructure in place in safe and efficient operating condition, communities have no reasonable expectation of keeping rail service in place simply as means to keep the rates of a preferred mode of transportation low. Following abandonments, shippers typically use other transportation modes and/or transload traffic to active rail lines.

Similarly, abandonments by small railroads typically do not have much effect on rail labor. In the case of abandonments pursued under the out-of-service notice of exemption process (which account for a little more than half of the decisions in 2005), employees have not

¹⁴ See STB Docket No. AB-1081X, *San Pedro Railroad Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, served February 3, 2006 (stating that “[i]t is well settled that a railroad will not be required to operate a rail line simply to prevent shippers from incurring higher transportation costs by truck”).

worked on the subject line for at least two and a half years at the time the exemption becomes effective. In most cases, the employees who historically worked on the abandonment candidate end up working on the productive parts of the small carrier's system. In cases in which employees are laid off, that unfortunate circumstance is caused by the absence of traffic and service on the subject line; it is not caused by the granting of regulatory authority for abandonment. Any adverse effect on employees will have occurred long before the time the line is actually abandoned. In any event, mandatory labor protective conditions apply to employees who are adversely affected by a small railroad abandonment. 49 U.S.C. § 10903(b)(2).

A line that handles no traffic, or even a line that gets one train per week service, is no longer providing meaningful employment opportunities to rail labor. Employees of small carriers are much better served by the rational redeployment of capital to lines that support rail service, than they are by regulatory processes that force small railroads to let a line languish for years. Investment in active lines leads to safer operations, better service and higher profitability (which, in turn, allows small carriers to pay higher wages), all of which benefit rail labor.

A review of the 32 small railroad abandonment and discontinuance decisions/notices served by the Board (or its Director of Proceedings) in 2005 supports these principles. In only one decision in 2005 did entities representing local community interests oppose the abandonment. *See* STB Docket No. AB-512X and AB-880X, *Sierra Pacific Industries – Abandonment Exemption – In Amador County, CA*; *SierraPine – Discontinuance Exemption – In Amador County, CA*, served February 25, 2005.¹⁵ In that proceeding, the Board nevertheless

¹⁵ In STB Docket No. AB-490 (Sub-No. 1X), *Greenville County Economic Development Corporation – Abandonment and Discontinuance Exemption – In Greenville County, SC*, served October 12, 2005, the Board noted that certain county residents opposed the abandonment, but the Board did not discuss or characterize the nature of this opposition, and the abandonment exemption was granted.

granted the abandonment, noting that both the potential for future growth in the traffic and the negative impact of the abandonment on the community, were too speculative. Moreover, in only seven of these 32 cases, was there any opposition at all, and in four of the seven cases the Board exempted the abandonment. The opposition in these four cases consisted largely of entities that either shipped only a small percentage of its traffic by rail¹⁶ or none at all.¹⁷ The three cases in which the abandonment exemption were denied are previously discussed above in footnote 8 (in two cases, the Board denied the exemption without prejudice because of insufficient supporting documentation, and in one case, the Board stayed the exemption amid questions about the validity of railroad's statements that affected shippers would have continued access to rail service).

As noted above, the small railroad abandonment decisions/notices in 2005 demonstrate that these cases involve rail lines that are short in length (an average length of 13.15 miles, with a median length of less than five miles) and that generate little opposition (an average of less than one opposing party). Under such circumstances, the impact of a small railroad abandonment or discontinuance on local communities likewise generally will be of a limited nature. However, in the exceptional case, in which the impact on a local community will be significant, the Proposed Rule, through its expanded OFA process, provides that local community with the best chance of preserving rail service.

¹⁶ STB Docket No. AB-914X, *McCloud Railway Company – Abandonment and Discontinuance of Service Exemption – In Siskiyou, Shasta, and Modoc Counties, CA*, served October 14, 2005 (noting that opposing shipper had handled approximately only 15 percent of its shipments by rail).

¹⁷ See STB Docket No. AB-290 (Sub-No. 260X), *Tennessee Railway Company – Abandonment Exemption – In Scott County, TN*, served June 17, 2005 (opposition by shipper that had not used the rail line); STB Docket No. AB-512X and AB-880X, *Sierra Pacific Industries – Abandonment Exemption – In Amador County, CA*; *SierraPine – Discontinuance Exemption – In Amador County, CA*, served February 25, 2005 (opposition by county and state entities and owner of facility, but *not* the tenants operating the facility); STB Docket No. AB-490 (Sub-No. 1X), *Greenville County Economic Development Corporation – Abandonment and Discontinuance Exemption – In Greenville County, SC*, served October 12, 2005 (one shipper opposing abandonment had never had access to rail service because it located on line after an embargo and another shipper's opposition largely concerned its opposition to converting line to trail; the STB did not characterize nature of other opposition).

At the end of the day, the impact on a local community as a result of a small railroad abandonment – loss of rail service -- ultimately will be the same whether the railroad receives abandonment authority pursuant to the two-year out-of-service exemption or a petition for exemption, or pursuant to the Proposed Rule. The critical difference is that, under the Proposed Rule, the local community will have the opportunity to take steps to preserve rail service *before* the line is beyond repair and the traffic has all been diverted to other modes. Local communities do not benefit from the death-spiral period that now precedes small railroad abandonments. In that period, little traffic flows due to high rates and reduced service. To the extent that traffic continues to trickle on the line, deferred maintenance increases the likelihood of derailment, which can adversely affect employees and local communities. There is simply no benefit to communities to delay an inevitable abandonment because there is virtually no benefit served by the physical presence of a rail line that does not and cannot provide competitive service options.

4. The Proposed Rule Permits The Board To Meet Its NEPA and NHPA Responsibilities With Respect To Discontinuances Of Service.

In the ANPR, the Board raises questions regarding the effect of the Proposed Rule on the Board's obligations under the National Environmental Policy Act of 1969 and the National Historic Preservation Act. Petitioners urge that the Board find that the Proposed Rule is not inconsistent with the Board's obligations under those statutes.

The current environmental regulations at 49 C.F.R. § 1105.6(b)(3) provide that an environmental assessment typically will be prepared for a discontinuance of freight operations. However, 49 C.F.R. § 1105.6(c)(2) provides that environmental documentation typically is not necessary for any action in which the thresholds at 49 C.F.R. § 1105.7(e)(4) or (5) are not exceeded. Under the Proposed Rule, the small railroad cannot discontinue service unless it certifies that the discontinuance will not exceed either of those threshold levels. Thus, the

proposal is consistent with the current regulatory language governing environmental requirements for a rail line discontinuance.

In addition, the current regulatory language governing historic reporting requirements for a rail line discontinuance would not appear to apply to the discontinuance of a rail line under the proposed class exemption. Under 49 C.F.R. § 1105.8(a), the historic reporting requirement applies to an action under 49 CFR § 1105.6(c)(2) (*i.e.*, an action in which neither threshold set forth at 49 CFR § 1105.7(e)(4) or (5) is exceeded), *only if* such action “will result in the lease, transfer, or sale of a railroad’s line, sites or structures.” Accordingly, the historic reporting requirement should not apply to a discontinuance under the proposed class exemption, because such a discontinuance will not result in a transfer, sale or lease of the applicable rail property.

Even if the historic reporting requirements applied to a discontinuance under the proposed class exemption, the current regulations provide an exception to those requirements at 49 C.F.R. § 1105.8(b)(1). That exception applies to “[a] sale, lease or transfer of a rail line for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older.” Under the proposed class exemption, (i) a small railroad must certify that it has no plans to alter or dispose 50 or more years old properties that are under the jurisdiction of the Board, and (ii) the small railroad does not yet have authority to abandon the line.¹⁸ Thus, the new proposal is similar to an already-existing exception to the historic reporting requirements.

Moreover, in recent decisions, the Board has exempted the discontinuance of a rail line from both the environmental and historic reporting requirements. *See Boston and Maine*

¹⁸ Under the proposed regulations, Section 1152.50(d)(7) provides that “[t]he authority to abandon shall become effective 30 days after the carrier has complied with the applicable [environmental and historical provisions], subject to any conditions imposed by the Board.”

Corporation – Discontinuance of Service Exemption – In Suffolk County, MA; Springfield Terminal Railway Company – Discontinuance of Service Exemption – In Suffolk County, MA; STB Docket Nos. AB-32 (Sub-No. 93X) and AB-355 (Sub-No. 31X), served June 14, 2005. See also Mid- Michigan Railroad, Inc. – Discontinuance of Service Exemption – In Kent County, MI, STB Docket No. AB-364 (Sub-No. 10X), served October 14, 2005; Central Illinois Railroad Company – Discontinuance of Service Exemption – In Peoria County, IL, STB Docket No. AB-1066X, served Dec. 23, 2005 (stayed on other grounds; court action subsequently initiated).

5. Deferred Maintenance and Increased Rates Result in Further Declines of Traffic.

In the ANPR, the Board asks commenters to discuss “the effects of deferred maintenance and increased rates on continued service on low volume lines.” ANPR at 5. In the Verified Statement of Christopher J. Burger appended hereto as Appendix B (hereinafter “VS Burger”), Mr. Burger, a former president of two Class III railroads and a former general manager of a Class II railroad, states that, when declining traffic volumes cause the revenues attributable to a line decline, railroads typically will try to offset the declining revenues with expense reductions. VS Burger at ¶ 5. Mr. Burger indicates that this typically will involve a reduction in track maintenance, which “reduces train speeds and increases derailment exposure.” *Id.* As the FRA track class of a line declines, the permissible operating speed declines. *Id.* For example, FRA Class 2 track can be operated at a maximum speed of 25 m.p.h., while FRA Class 1 track can be operated at a maximum of only 10 m.p.h. *Id.* A reduction of operating speeds from 25 m.p.h. to 10 m.p.h. means that crews will have to work as much as two and one-half times as long to traverse the same distance. *Id.* at ¶ 6. Accordingly, crews costs increase as operating speeds decrease, especially if the federal Hours of Service law causes a carrier to use two crews in order to perform the work formerly done by one crew. Lower operating speeds also result in higher car hire and fuel costs for the carrier. VS Burger ¶ 9. Once crew costs, car hire and fuel

expenditures increase dramatically, the railroad typically reduces the service schedule, which in turn causes shippers to look to other modes to handle their traffic.

When a railroad begins deferring maintenance on a low-density line, service inevitably suffers as operating speeds are reduced and derailments occur more frequently. VS Burger at ¶ 7. The decline in service then causes a further decline in traffic volume, which in turn causes the railroad to cut spending on the line even more in an effort to minimize losses. Curtailment of service exacerbates the problem and drives more traffic to other modes. Once the cycle begins, there is little likelihood that service on the line will be revived absent an extraordinary event such as the decision of a large rail shipper to locate a facility on the line. *Id.*

As labor expenses increase as a result of decreased maintenance, “the railroad will be forced to either reduce maintenance further or increase transportation rates.” *Id.* at ¶ 7. As Mr. Burger notes, “For anything other than bulk commodities like grain or coal, the ability of a railroad to compete with trucks declines quickly as the revenue requirements increase.” *Id.* Increasing rates inevitably results in further traffic declines. At this point, the railroad is largely indifferent to the loss of additional traffic because the likelihood is that carrier is handling the traffic at a loss. *Id.* As with the case of deferring maintenance, the steady increasing of rates will cause further loss of traffic.

There is little doubt that the combination of deferred maintenance and increased rates will, in short order, cause traffic volumes to decline precipitously. As witness Burger indicates, once traffic and revenue begin to fall off, there is even greater incentive to cut costs and reduce service. In these circumstances, abandonment of the line will inevitably occur.

6. The Proposed Rule Should Be Modified to Prevent Abuse.

The Board notes in the ANPR that rail labor has raised concerns that Class I railroads might abuse the Proposed Rule by spinning off lines to small railroads, which would then

abandon the lines through the expedited notice of exemption process. Petitioners urge that the Board address this concern by adding a requirement that a Class II or Class III railroad that uses the expedited procedure must own (or lease) the subject line for at least two years.

7. The Proposed Rule Should be Modified to Provide Communities With More Notice.

After discussion with shipper groups, the Petitioners urge that the Proposed Rule be modified by requiring a small railroad to notify the Board 60 days prior to filing the proposed notice of exemption. This pre-filing notice, which would be published in the Federal Register, would give shippers, communities and local government additional time to consider purchase or subsidy strategies, and to secure financing.

Petitioners urge that the Board not adopt a pre-filing notice requirement in excess of 60 days. The purpose of the Proposed Rule is to permit small railroads to redeploy capital in an efficient manner, and to free small railroads from the obligation to operate lines that it has determined do not support rail service. An expedited procedure will permit an abandonment to occur prior to further deterioration of the existing traffic base and rail infrastructure, which in turn will increase the likelihood of sales through the OFA process. The Board should not undermine these benefits through a protracted pre-filing notice requirement. Sixty days' notice serves the interests of all concerned parties.

8. The Board Should Not Merely Reduce the Out of Service Period to One Year.

In the ANPR, the Board notes that the two-year out-of-service exemption (49 C.F.R. § 1152.50) has worked well, and questions whether a one-year out-of-service exemption would "alleviate some of the frustrations" expressed by Petitioners regarding the current regulatory scheme for abandonments. In fact, modifying the two-year out-of-service exemption to be a one-year out-of service exemptions would do little to address the shortcoming in the existing

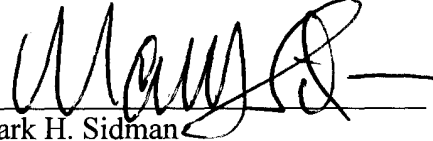
regulations, and Petitioners urge that the Board not view this approach as a quick-fix compromise.

Under 49 C.F.R. § 1152.50(b) a rail carrier may abandon or discontinue service using a notice of exemption, “if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines. . . .” To utilize this provision, local traffic has to have completely ceased. In most cases, the cessation of all local traffic will follow a period of increased rates, reduced service and deferred maintenance – the so-called death spiral. By the time all local traffic stops moving, the likelihood that it will move in significant volumes again is small because the shippers will have secured alternative transportation and the cost of rehabilitating the line will be prohibitive. Even if the waiting period were reduced from two years to one year, the carrier will be forced to go through the wasteful exercise of deferring maintenance, reducing service and increasing rates – which could take a year or more – followed by another year when the rail line lies fallow.

Petitioners urge that the Board refrain from “splitting the baby” in this manner. The RTP is advanced by making lines available for purchase through an OFA at the earliest possible moment, when traffic volumes and track condition present the best possible scenario for continued rail use. No purpose is served by perpetuating a two-act play in which the carrier

takes rational steps that lead to the cessation of traffic in the first act and the rail line sits unused for a year or two in the second act.

**RESPECTFULLY SUBMITTED
ON BEHALF OF PETITIONERS**

A handwritten signature in black ink, appearing to read 'Mark H. Sidman', written over a horizontal line.

Mark H. Sidman
Jo A. DeRoche
Rose-Michele Nardi
Weiner Brodsky Sidman Kider PC
1300 19th Street NW, Fifth Floor
Washington, DC 20036-1609

Dated: March 6, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

**ALLEGHENY & EASTERN RAILROAD, INC., ET AL. –
CLASS EXEMPTION FOR EXPEDITED ABANDONMENT
PROCEDURE FOR CLASS II AND CLASS III RAILROADS**

APPENDIX A

1. STB Docket No. AB-1066X, *Central Illinois Railroad Company – Discontinuance of Service Exemption – In Peoria County, IL*, served December 23, 2005, stayed by decision served January 20, 2006 in this proceeding.
2. STB Docket No. AB-297 (Sub-No. 102X), *Columbus and Greenville Railway Company – Abandonment Exemption – In Leflore County, MS*, served December 22, 2005.
3. STB Docket No. AB-980X, *Santa Clara Valley Transportation Authority – Abandonment Exemption – In Santa Clara and Alameda Counties, CA*, served December 16, 2005.
4. STB Docket No. AB-290 (Sub-No. 236X), *The Cincinnati, New Orleans and Texas Pacific Railway Company – Abandonment Exemption – In Roane County, TN*, served December 2, 2005.
5. STB Docket No. AB-167 (Sub-No. 1186X), *Consolidated Rail Corporation – Abandonment Exemption – In Cumberland County, NJ*, served October 20, 2005.
6. STB Docket No. AB-914X, *McCloud Railway Company – Abandonment and Discontinuance of Service Exemption – In Siskiyou, Shasta, and Modoc Counties, CA*, served October 14, 2005.
7. STB Docket No. AB-364 (Sub-No. 10X), *Mid-Michigan Railroad, Inc. – Discontinuance of Service Exemption – In Kent County, MI*, served October 14, 2005.
8. STB Docket No. AB-314 (Sub-No. 3X), *Chicago, Central & Pacific Railroad Company – Abandonment Exemption – In Linn County, IA*, served October 12, 2005.

9. STB Docket No. AB-490 (Sub-No. 1X), *Greenville County Economic Development Corporation – Abandonment and Discontinuance Exemption – In Greenville County, SC*, served October 12, 2005.
10. STB Docket No. AB-254 (Sub-No. 8x), *Providence and Worcester Railroad Company – Abandonment Exemption – In Providence County, RI*, served October 4, 2005.
11. STB Docket No. AB-1067X, *General Railway Corporation d/b/a/ Iowa Northwestern Railroad – Abandonment Exemption – In Osceola and Dickinson Counties, IA*, served September 23, 2005.
12. STB Docket No. AB-441 (Sub-No. 4X), *San Pedro Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, served September 15, 2005, petition refiled in STB Docket No. 1081X with decision granting abandonment served February 3, 2006.
13. STB Docket No. AB-976X, *Pittsburg & Shawmut Railroad, LLC – Abandonment Exemption – In Armstrong and Jefferson Counties, PA*, served September 15, 2005.
14. STB Docket No. AB-682X, *The Los Angeles Junction Railway – Abandonment Exemption – In Los Angeles County, CA*, served August 31, 2005.
15. STB Docket No. AB-70 (Sub-No. 4X), *Florida East Coast Railway, L.L.C. – Abandonment Exemption – In Miami-Dade County, FL*, served August 5, 2005.
16. STB Docket No. AB-369 (Sub-No. 5X), *Buffalo & Pittsburgh Railroad, Inc. – Discontinuance of Service Exemption – Between Brookville and Mahoning in Jefferson and Armstrong Counties, PA*, served June 29, 2005.
17. STB Docket No. AB-979X, *Connecticut Southern Railroad, Inc. – Abandonment Exemption – In Hartford County, CT*, served June 29, 2005.
18. STB Docket No. AB-290 (Sub-No. 260X), *Tennessee Railway Company – Abandonment Exemption – In Scott County, TN*, served June 17, 2005.
19. STB Docket No. AB-70 (Sub-No. 5X), *Florida East Coast Railway, L.L.C. – Abandonment Exemption – In Brevard County, FL*, served June 16, 2005.
20. STB Docket Nos. AB-32 (Sub-No. 93X) and AB-355 (Sub-No. 31X), *Boston and Maine Corporation – Discontinuance of Service Exemption – In Suffolk County, MA; Springfield Terminal Railway Company – Discontinuance of Service Exemption – In Suffolk County*, served June 14, 2005.
21. STB Docket No. AB-646X, *Atlantic & Western Railway, L.P. – Abandonment Exemption – In Lee County, NC*, served May 13, 2005.
22. STB Docket No. AB-792X, *Railroad Switching Service of Missouri, Inc. – Abandonment Exemption – In St. Louis County, MO*, served May 2, 2005.

23. STB Docket No. AB-933X, *Dakota, Missouri Valley & Western Railroad, Inc.* – *Abandonment Exemption – In Burleigh and Emmons Counties, ND*, served April 29, 2005.
24. STB Docket No. AB-295 (Sub-No. 6X), *The Indiana Rail Road Company* – *Abandonment Exemption – In Monroe County, IN*, served April 15, 2005.
25. STB Docket No. AB-927X, *Boot Hill & Western Railway Co., L.C.* – *Abandonment Exemption – In Ford County, KS*, served April 5, 2005.
26. STB Docket No. AB-771X, *Mount Vernon Terminal Railway Company L.L.C.* – *Abandonment Exemption – In Skagit County, WA*, served March 23, 2005.
27. STB Docket Nos. AB-170 (Sub-No. 2X) and AB-398 (Sub-No. 10X), *Sunset Railway Company – Abandonment Exemption – in Kern County, CA; San Joaquin Valley Railroad Company – Discontinuance Exemption – In Kern County, CA*, served March 21, 2005.
28. STB Docket No. AB-883 (Sub-No. 1X), *Rocky Mount and Western Railroad Co., Inc.* – *Abandonment Exemption – In Nash County, NC*, served March 9, 2005.
29. STB Docket No. AB-541 (Sub-No. 1X), *Portland & Western Railroad, Inc.* – *Abandonment Exemption – In Washington County, OR*, served March 4, 2005.
30. STB Docket No. AB-512X and AB-880X, *Sierra Pacific Industries – Abandonment Exemption – In Amador County, CA; SierraPine – Discontinuance Exemption – In Amador County, CA*, served February 25, 2005.
31. Docket No. AB-290 (Sub-No. 259X), *Tennessee Railway Company – Abandonment Exemption – In Anderson and Campbell Counties, TB*, served January 19, 2005.
32. STB Docket No. AB-68 (Sub-No. 4X), *Lake Superior & Ishpeming Railroad Company – Abandonment Exemption – In Marquette County, MI*, served January 19, 2005.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PETITION FOR RULEMAKING

STB EX PARTE NO. 647

**ALLEGHENY & EASTERN RAILROAD, INC., *ET AL.* –
CLASS EXEMPTION FOR EXPEDITED ABANDONMENT
PROCEDURE FOR CLASS II AND CLASS III RAILROADS**

APPENDIX B

1. My name is Christopher J Burger. I retired as president and chief executive officer of Central Properties, Inc. (CPI), a short line railroad holding company, when the company was sold in 1998. In that capacity, I also was president of each of its railroad properties, The Central Railroad Co. of Indianapolis and The Central Railroad Co. of Indiana. Both were class III railroads.

2. Following my retirement, I established a consulting practice to assist short line railroads, industries, local government entities and non-profit organizations in addressing railroad issues. These activities have included safety, operational start-ups, "Best Practice" analyses, trusteeship, operational and financial studies and analyses, feasibility studies and other activities in the US and overseas.

3. Before joining CPI in 1994, I was general manager of the Central Vermont Railway, a class II railroad that was a wholly owned subsidiary of the Grand Trunk Corp., which in turn was a wholly owned subsidiary of the Canadian National Railway.

Prior to that, I spent twenty-two years with the Chicago & North Western Railroad in positions from trainmaster to vice president. My railroad career began in 1959 as a signal helper on the New York Central Railroad in Harmon, NY. I later entered the railroad's management training program. I was trainmaster at Newberry Jct., PA when I left in 1967 to join the C&NW. My military service was with a Railway Operating Battalion of the US Army Transportation Corps. I am a Director of the Center for Railroad Photography & Art and serve on advisory boards of the National Railroad Museum and the Midwest Railroad Research Center.

4. The C&NW in the '60s and '70s was a study in the economics and heartbreaks of trying to keep light-density lines going. Its efforts and scarce capital were needed on those portions of the railroad where traffic and/or potential justified it, such as the main line from Chicago to Fremont, Nebraska, its strategically vital link to the Union Pacific. Investment here made business such as the "Fresh From the West" traffic and CNW's intermodal "Falcon" trains possible. But there were thousands of miles of track that lacked the traffic base to support investment. Not a single dollar was spent on the "Cheap and Nothing Wasted" that had not survived a rigorous analysis of its return on investment, yet the railroad was forced to keep these unprofitable lines in service for years while the lengthy and laborious abandonment process took place, to the detriment of efforts to maintain and upgrade viable lines..

5. When declining traffic on a line causes revenue on that line to decline, a railroad will attempt to offset this with expense reductions. Typically this means a reduction in track maintenance, which in turn reduces train speeds and increases derailment exposure. The Federal Railroad Administration establishes the standards for

the speed of operations on certain classes of track. If there is not enough revenue to justify installing enough new ties, ballast and other track maintenance to maintain Class 4 standards, then the speed of the track is allowed to deteriorate to Class 3 standards, permitting operations at a maximum of 40 miles per hour rather than 60 miles per hour. If the revenue cannot support the maintenance to maintain that speed, the standards are dropped to Class 2, permitting operations at or below 25 miles per hour. The next step down is Class 1, over which a train may not exceed 10 miles per hour. Finally, there is "excepted" track – where certain types of hazardous material traffic and all passenger operations are prohibited or restricted and speed is restricted to 10 mph.

6. When track speed is permitted to decline due to lack of maintenance, then the amount of time it takes a crew to serve on-line customers increases. For example, if Class 2 (25 mph) track is reduced to Class 1 (10 mph), then a crew that serves a 50-mile long line will go from 4 hours, to 10 hours of running time. This reduces the time available to switch and serve customers. In this example, if there is more than 2 hours of actual switching to be done, then a single crew will not be able to complete the work within the 12 hours it is permitted to work under the Hours of Service law. Now it will take two crews to perform the same amount of work to generate the same amount of revenue.

7. To cover these additional labor expenses, the railroad will be forced to either reduce maintenance further or increase transportation rates. For anything other than bulk commodities like grain or coal, the ability of a railroad to compete with trucks declines quickly as the revenue requirements increase. By the time this happens, the railroad usually is indifferent to the loss of traffic that results from rate increases because

it is likely handling the traffic at a loss. Once a railroad begins reducing maintenance on a low density line, service invariably suffers, leading to even further traffic declines. This cycle eventually will result in the abandonment of the railroad of the rail line unless an extraordinary event, such as the location of a significant new shipper on the line, occurs.

8. On a perhaps less obvious and less quantifiable level, the lines that were in a decline also required a disproportionate amount of management time and effort. As the track deteriorates, the risk of derailment increases as do customer complaints and the time needed to address them and to devise operating plans to provide service.

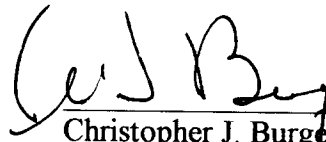
9. Another consequence of reducing speeds and/or frequency of service is that Car Hire and locomotive fuel costs increase. Car Hire is the price railroads pay each other for freight cars on their lines. It is computed hourly. When a line is served less frequently, cars are on the line longer and car hire costs escalate -- sometimes to the point where they exceed a short line's revenue from the car. Locomotive fuel usage too, is partially a function of time. The longer a locomotive is running the more fuel it uses. Additionally, the more time it spends on a light density line, the less time it's available for use on more profitable lines. Asset utilization is a key goal of today's railroads.

10. When shippers can no longer trust that their cars will get from origin to destination at any predictable time, they are less inclined to use the railroad. Even grain can be shipped by truck to its destination or to a loading point on another carrier. And when the railroad gets to the point that there is no reliability, or it is known that the future of a line is in doubt, attracting new business development to the line becomes difficult, if not impossible. Raising rates under these circumstances can cause further traffic erosion.

11. As difficult as the financial and operational burdens described above are for a class I railroad, they are even more so for a class II or class III as these railroads typically lack the financial and other resources of a class I and are, in many cases, struggling to overcome deferred maintenance on lines they acquired. And in general, class III railroads are already operating on very tight budget restrictions.

VERIFICATION

I, Christopher J. Burger, certify under penalty of perjury that the verified statement is true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to cause this verified statement to be filed.


Christopher J. Burger

Dated: March 3, 2006